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Supreme Court of the United States

October Term, 1977

No. 77-1710

NATIONAL WILDLIFE ART EXCHANGE, INC.,
AND RALPH H. STEWART,
Petitioners,

vs.

FRANKLIN MINT CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONERS

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Respondent's brief in opposition to the petition hides behind the "no copying" holding of the lower Courts, but that holding is meaningless. Respondent's position only serves to underscore the reasons why this Court should accept the petition and set out meaningful tests for proof of copyright infringement, as this Court did for patent validity in *Graham v. John Deere*, 383 U.S. 1 (1966).

A new copyright act went into effect on January 1, 1978. This is an age of mass communication with all sorts of copyright/intellectual property/first amendment problems. There are not even any decisions of the Supreme Court under the 1905 Copyright Act which are concerned with substantive copyright infringement questions. The time is ripe for the Supreme Court to provide guidance in this area. The facts of this case are ideal from which to formulate a meaningful test for proof of copyright infringement.

In the leading case of *Arnstein v. Porter*, 154 F.2d 464 at page 468, the Second Circuit held that the elements essential to a copyright infringement case were proof that (a) defendant "copied" from plaintiff's copyrighted work and (b) the copying went so far as to constitute improper appropriation. Proof of the first element usually is access to the copyrighted work and some use of the copyrighted work in the making of the accused work or at least circumstantial evidence of such use. Here the artist had access and he admitted using the final compositional sketch (FX 83F-A39) of the copyrighted work in making the accused work. This should have made out the first element of National's case and the Court should have directed its attention to the second element.

Respondent argues that the holding of "no copying" was a finding of fact, but the works themselves were not considered in reaching that conclusion and the holding is therefore meaningless. The self-serving testimony of the artist was the only basis for that holding. If an artist admits using the copyrighted work in the creation of the accused work but testifies that he did not "copy", what can it mean? Moreover, what artist would ever admit that he did copy?

The District Court said that "it is the element of actual piracy which is lacking in National's case" (A34). Is piracy an essential element of proof in copyright infringement? At some point do the works not speak for themselves?

The intention of Congress is that copyrights be valuable rights, but that intention has been frustrated in this case. This is a David v. Goliath struggle in which the law required wholly unreasonable standards of proof from David.

The lower Courts have definitely applied a wrong test of infringement in this case. They focused on the differences between the works instead of the similarities. They did not consider cardinal paintings by other artists in order to determine the line between an unprotectable idea and an unlawful appropriation of the expression of the idea. They did not determine to what extent the similarities of the first painting had been improperly appropriated or plagarized and used again in the second painting. The lower Courts ignored the base point from which they could have determined the proper scope of copyright protection. If the theme is creative and unique, a variation on that theme should be an infringement, which is the case here.

The negative overlays in the back of the petition show how close the works are. When you look at one work and then the other, the first impression is that they are the same and you have to study them to find the differences.

The third painting done in the Courtroom is not relevant, was objected to, and should not be considered. If anything, it is another infringement and illustrates the infinite possibilities which the decisions below provide to those who wish to appropriate the intellectual property of others. The artist used the final compositional drawing for the first painting, the "mold" (FX 83F—A39) in making the third painting.

Respondent speaks of the conventions of ornithological art, how "The Cardinal" was created and why it is a permissible "variation on a theme" instead of an infringement. However, the Court has only to look at the many various ways of painting cardinals done by other artists in the cardinal paintings in evidence to realize that what the artist did here was wrong. The cardinal paintings of the other ornithological artists are much more relevant to infringement than Winslow Homer's schoolboys.

As Judge Learned Hand said, Franklin Mint should not have been able to excuse "The Cardinal" by showing how much of the copyrighted work had not been pirated, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2nd Cir.1936).

The Third Circuit said that it would not excommunicate cardinals any more than Justice Holmes would ban the Ballerinas (A13). No one asked them to excommunicate cardinals. Petitioner asked them to excommunicate unlawfully appropriated material, cardinals on a forked branch of an apple tree in blossom which has the same design, impact and impression on the ordinary lay observer as the subject of its copyright when no one else had even used a similar compositional design or even painted cardinals in an apple tree.[1]

It was so easy to avoid infringement, the question should have been why the artist and Franklin Mint felt obligated to do what he did.

Petitioner's statement of the case is correct. The artist testified (R 777) that Franklin Mint did not know that the accused painting was going to involve cardinals on apple blossoms until the finished painting was submitted to the engraver from which he was to copy the published print. Franklin Mint did not see any sketches or layouts of "The Cardinal". This was contrary to its practice followed with respect to the first three paintings of this series wherein Franklin Mint was shown sketches and layouts of the proposed works, as provided in the contract with the artist. Franklin Mint was shown "Cardinals on Apple Blossoms" and knew that it was a success.

National Wildlife Exhibit 97, reproduced in the back of the petition, is the closest cardinal painting by another

1. In reporting on the case the local newspaper reproduced the paintings and got the pictures mixed up (R 1483).

artist in that it has (a) a male and female cardinal one above the other (b) a forked branch and (c) blossoms. No other cardinal painting by any other artist combines these three features, which shows how close the second painting is to the first and how far away the other paintings are. The O'Neill cardinal (FX 471) and the Gronner cardinal (FX 82, Respondent's footnote 5 p. 5) have entirely different compositions.

The works here in issue were not painted from nature. There was no photograph or sketch from life of two cardinals on an apple tree in blossom from which the artist developed these paintings. The paintings were created in the mind of the artist, assembled from source material which can be reassembled in a thousand other ways.

In *Sid & Marty Kroffit Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), the Ninth Circuit analyzed the tests of infringement. It noted the rule that a copyright could not protect an idea but could protect the expression of an idea and called for an "extrinsic" test to determine what the idea was and an "intrinsic" test to determine whether the expression of the idea had been appropriated. But no court tells one how to separate the idea from the expression of the idea. It cannot be done in a vacuum. There are more than twenty-two paintings of cardinals by other artists in the record. They should have been considered because only by surveying this relevant material can one develop any criteria from which to determine where the "idea" leaves off and the "expression of the idea" begins. In patent law you consider the prior art and the level of skill in the art. What should be considered with copyrights?

The Court of Appeals held that a pattern of differences is sufficient to establish a diversity of expression rather than only an echo (A12). But one can copy a single chap-

ter in a book verbatim and be an infringer. One does not have to copy the whole book and the Court should not compare whole books. Differences do not excuse plagarism.

In *Schroeder, et al. v. William Morrow and Company, et al.*, 198 U.S.P.Q. 143 (7th Cir. 1977) a defendant copied names and addresses from a catalogue but not descriptive write-ups. The two catalogues did not look alike. The Court of Appeals looked at the similarities which had been copied, found infringement and reversed the District Court. This Seventh Circuit case is in direct conflict with the decisions below, wherein the Courts looked at the differences.

The Second Circuit found infringement in *Gross v. Seligman*, 212 F. 930 (2nd Cir. 1914), because "the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original". This is a test which should have been applied.

The last time that the Supreme Court addressed the question of a test of copyright infringement was in *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1907) where it quoted an earlier decision that "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original".

"The Cardinal" gives every person seeing it the idea created by "Cardinals on Apple Blossoms". Why isn't it an infringement?

The fact that the same artist did both works has confused this case and caused the lower Courts to reach the wrong conclusion. This same fact, however, makes the case a unique vehicle for setting out the appropriate test of copyright infringement and provide much needed direction to the lower Courts.

Franklin Mint's infringement has destroyed the credibility of National Wildlife in the marketplace and ruined its business. Why should anyone now buy a print limited in edition to 300 copies from National Wildlife, if Franklin Mint can closely duplicate that print and publish another 6000 copies of the same? The decisions below make a mockery of the copyright laws. They are a miscarriage of justice. Unless reversed, they will devastate the limited edition print business and will have far-reaching adverse effects on every single piece of copyrightable material.

The petition should be granted.

Respectfully submitted,

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